IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

ARBITRATION APPEAL NO.12 OF 2006

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Brahmesh S. Patel ...Appellant

v/s.

Smt.Kokila Niranjan Patel ...Respondent

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Mr.Gaurav Joshi with Mr.Simil Purohit, Mr.S.N.Vimadalal & Ms. Sandhya Tolat i/b M/s.Vimadalal & Co. for the Appellant.

Mr.Hiralal Thakkar,Sr.Counsel with Mr.G.R.Kinkhabwalla & Mr.R.M.Pardiwala i/b M/s.Mulla & Mulla & CBC for Respondents Nos. 5 to 7.

Ms.Shruti Desai for Respondents Nos. 1 to 4.

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CORAM: D.K.DESHMUKH, J.

DATED: 16TH AUGUST, 2006

P.C.:

By this appeal filed under Section 37 of the Arbitration & Conciliation Act, 1996 the Appellant challenges the interim award dated 9th January, 2006 whereby the learned arbitrator has held that he has no jurisdiction to entertain the claim No.6 made in the statement of claim.

2. The facts that are material and relevant are that before the arbitrator the appellant has made several claims. By claim No.6, which the learned arbitrator has held that he has no jurisdiction to entertain, the appellant seeks a direction that he is entitled to the entire first floor and the Hall and the remaining stilt area of the Juhu Building. According to the Appellant in the year 1992 at the instance of one Somabhai, the Appellant executed the document dated 1st April, 1992 creating tenancy in favour of Harivadan S. Patel, whose legal representatives are

Respondents Nos. 5 to 7. But according to the Appellant, this document dated 1st April, 1992 creating tenancy of the area in favour of Harivadan was not acted upon. Further according to the Appellant on 17-1-1999, Harivadan executed a document surrendering the tenancy of the area and handing over possession to the Appellant. That document according to the Appellant was executed at the instance of Somabhai, though Harivadan was in possession of the area , to indicate that the earlier document was cancelled. According to the Appellant, thus, he was continuously in possession of the area. According to the Appellant, after Somabhai died, Respondents Nos. 5 to 7 who were legal representatives of Harivadan took unlawful possession of that area if the Juhu Building. The Appellant, therefore, is seeking an award for possession of that area from the Respondents Nos. 5 to 7.

. The Respondents Nos. 5 to 7 filed a reply contending that they are in possession of the area as tenant of the area and therefore, in view of the provisions of the Maharashtra Rent Control Act, the learned arbitrator does not have jurisdiction to entertain Claim No.6. Because this objection was

raised, the learned arbitrator framed a preliminary issue. Admittedly, parties have not led any evidence and the learned arbitrator has decided the preliminary issue holding that in view of the provisions of Section 33 of the Maharashtra Rent Control Act, which confers exclusive jurisdiction upon the Court of Small Causes to entertain the dispute between the landlord and tenant, the arbitrator has no jurisdiction to entertain the claim. It is this order made by the learned arbitrator which is challenged in the present Appeal.

3. According to the learned Counsel appearing for the Appellant, the learned arbitrator has held that he has no jurisdiction to entertain the claim without considering the case of the Appellant that the agreement dated 1st April, 1992 was never acted upon. According to the learned Counsel, as the agreement dated 1st April, 1992 was never acted upon, there was no question of there being any tenancy created in favour of Harivadan and therefore, the learned arbitrator had the jurisdiction to entertain the claim No.6. According to the learned counsel, though the Respondents Nos. 5 to 7 claim to be the tenant, the arbitrator had the jurisdiction to inquire into

the question whether they have established their case that they are the tenants. In the submission of the learned Counsel, the parties had agreed to proceed before the learned arbitrator on the basis of the pleadings of the parties and therefore, it was for the learned arbitrator to decide whether on the basis of the pleadings of the parties, issue can be decided in favour of the Respondents Nos. 5 to 7. The learned Counsel in support of this proposition relies on the judgment of the Supreme Court in the case of **Mani Nariman Daruwala v/s. Phiroz N. Bhatena and ors., (1991) 3 SCC 141.** The learned Counsel submits that the learned arbitrator had the jurisdiction to decide the question whether the tenancy was actually created in favour of Harivadan or not, and according to the learned Counsel for deciding that question, the learned arbitrator should have accepted the averments made in the statement of claim at their face value.

4. On the other hand, on behalf of the Respondents Nos. 5 to 7 it is submitted that the learned arbitrator was deciding the jurisdiction in terms of the provisions of Section 16 of the Arbitration Act and therefore, there was no question of averments

made in the statement of claim being taken at their face value. Therefore, according to the learned Counsel, it was for the Appellant to lead evidence, both documentary and oral to establish that he did not create tenancy, at any point of time, in favour of Harivadan. But the Appellant has chosen not to lead evidence. The learned Counsel further submits that as it is clear from the record that by document dated 1st April, 1992 tenancy of the premises was created in favour of Harivadan, the question whether Harivadan subsequently surrendered the tenancy or not and also the question whether the tenancy was actually created by the Appellant in favour of Harivadan are the questions in the exclusive jurisdiction of the Small Causes Court. He relies on the judgment of the Supreme Court in the case of **Babulal Bhuramal and another v/s. Nandram Shivram and ors, AIR 1958 SC 677**.

5. Now, if in the light of these rival submissions the record of the case is perused, it becomes clear that in so far as the case of the Appellant in relation to claim No.6 is concerned, it is paragraphs xvii & xviii of the statement of claim which is relevant. Paragraphs xvii & xviii are read as

under:-

xvii) After the Deed of Family Arrangement, the disputes and differences between the family increased and intensified and the Claimant was physically assaulted and mentally tortured by the Late Somabhai and his brother late Harivadan whereupon on or about the 3rd or 4th of July 1991, the Claimant and his family was forced to lock the flat and area in his possession in the said Juhu Building and had to go and stay at Tranquility Building, Shastri Nagar, Andheri (East), for a period of about 18 months. Thereafter the Claimant shifted to his present accommodation situate at Lokhandwala Complex, Andheri (West), Mumbai.

xviii) Sometime in the year 1992, on account of disputes which arose between Somabhai on one hand and Harivadan on other, Somabhai approached the Claimant and requested the Claimant to create a temporary tenancy of the Claimant’s area in favour of the said harivadan and which temporary tenancy was

created under the Agreement dated 1st April 1992 but without handing over any physical possession or any monetary consideration or in any manner being acted upon by the Late Harivadan. A copy of the same is annexed as Annexure N to the Compilation of Documents filed herewith. The possession of the same continued to be with the Claimant as this tenancy was not to be acted upon as agreed with Somabhai. No rent is received by the Claimant from the said Harivadan under the said Agreement and all maintenance charges are paid by the Claimant, the Claimant utilized the ground floor as his office premises till on or about 1998/1999. The said somabhai at the same time had also differences with Respondent Nos. 2 to 4. The Claimant, considering that Somabhai is his father and was aged handed over keys of his area in the Juhu Building to the said Somabhai. Subsequently on 7th January 1999, the said Harivadan recorded of his handing over the peaceful possession of Claimant’s area to the Claimant in his writing dated 7th January 1999. The said writing was executed at the

> instance of Somabhai although Harivadan was not in possession of the said area, only with a view of cancelling the earlier tenancy agreement in favour of Harivadan and to render it ineffective. A copy of the said letter is annexed and marked as Annexure O to the Compilation of Documents filed herewith. The first Original of the same, is destroyed in the floods which took place in the city on 26th July 2005 and during which floods many documents and articles in the Claimants' office situate at Sakinaka, Andheri have been destroyed.

6. It is clear from the above quoted paragraphs that according to the Appellant, he was always in possession of the area, though he executed the document dated 1st April, 1992 creating tenancy in favour Harivadan. Even the document dated 17-1-1999 by which Harivadan is supposed to have surrendered the tenancy, according to the Appellant was a formal document. The Appellant is not in a position to produce the original of the document dated 17-1-1999 whereby Harivadan is supposed to have surrendered the tenancy. The Respondents Nos. 5 to 7 filed their

reply, thereby claiming that by MOU dated 1st April, 1992 tenancy of the premises was created in favour of Harivadan. He was given possession of that area as tenant and that he was paying Rs.1000/- as rent and that the family of Harivadan has been occupying the area since then, and according to the Respondents Nos. 5 to 7 as they are in possession of this area as tenant, the arbitrator does not have jurisdiction to make any award in relation to this area. Respondents Nos. 5 to 7 also deny the document dated 7-1-1999. They claim that that document is fabricated by the Appellant. In view of the objection raised by the Respondents Nos. 5 to 7 to the jurisdiction of the learned arbitrator in relation to claim No.6, it becomes necessary to see the provisions of Section 16 of the Arbitration Act. It is sub-sections (2) to (5) of Section 16, which are relevant. They read as under:-

> 16(2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence, however, a party shall not be precluded from raising such a plea merely because that he has appointed, or participated

in the appointment of an arbitrator.

(3) A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings.

(4) The arbitral tribunal may, in either of the cases referred to in sub-section (2) or sub-section (3), admit a later plea if it considers the delay justified.

(5) The arbitral tribunal shall decide on a plea referred to in sub-section (2) or sub-section (3) and, where the arbitral tribunal takes a decision rejecting the plea, continue with the arbitral proceedings and make an arbitral award.

7. Perusal of the provisions of Section 16 shows that the Respondent before the arbitrator is under a duty to raise an objection to the jurisdiction of the arbitrator at the earliest point of time and the arbitrator can permit the Respondent to raise an

objection to his jurisdiction at a later stage only for sufficient cause. Sub-section 5 casts a duty on the arbitrator to decide an objection raised to his jurisdiction before deciding the claim on merits. The judgment relied on by the learned counsel appearing for the Appellant in the case of Mani Nariman Daruwala arose out of the execution proceeding where an objection was raised that the decree is a nullity, and therefore the Supreme Court has said for deciding whether the decree of which execution is sought is nullity or not, it is only the averments made in the plaint which will have to be taken into consideration, because in that case the decree was passed in a suit which was not contested. But even where the suit is contested and the Civil Procedure Code applies, it can be taken to be now a settled law that when the court is deciding whether it has jurisdiction to entertain the claim or not in an application under Order 7 Rule 11, then the court has to decide the question of jurisdiction at demurer i.e. by accepting the averments in the plaint at the face value. At that point of time the court cannot take into consideration what is said by the Defendant in his reply, application or written statement. But after the written statement is filed and the court

frames the issues, out of the issues framed by the court only those issues relating to the jurisdiction of the court which can be decided only on the basis of law and on the basis of facts which are admitted by the parties, can be decided as a preliminary issue. So far as Section 16 of the Arbitration Act is concerned, it is apparent that it is a departure from the procedure laid down by Civil Procedure Code. Because Section 16 obliges the arbitrator to decide every objection to his jurisdiction raised as a preliminary issue it may be an issue of law or an issue purely of fact. Therefore, even when the issue of jurisdiction is not purely a question of law, and is a question of fact or a mixed question of fact and law, still the arbitrator is under an obligation to decide that issue first. Obviously, therefore, if the parties decide to lead evidence on a preliminary issue, which may be mixed question of fact and law , the arbitrator has to give that opportunity to the parties. It is nobody's case before me that the Appellant desired to lead evidence before the arbitrator and the arbitrator declined to grant him that opportunity. It is also nobody's case that the parties agreed that there is no evidence necessary. In my opinion, really speaking considering the case

put up by the Appellant, it was necessary for him to lead oral evidence in support of his case. In the face of the document dated 1st April, 1992, the only method by which the Appellant could have proved that Harivadan was not the tenant of the premises was by leading oral evidence. Because, if one goes by the document on record, tenancy of the premises was definitely created in favour of Harivadan. The question whether the tenancy in favour of Harivadan was actually created, whether the heirs of Harivadan were in possession of the premises as tenant would be the exclusive jurisdiction of the Small Causes Court. The Supreme Court in its judgment in the case of Babulal Bhuramal (supra) has considered the provisions of Section 28 of the Bombay Rent Act. It is common ground before me that provisions of Section 28 of the Bombay Rent Act and Section 33 of the Maharashtra Rent Control Act are paramateria in so far as the aspects which are relevant for the present case are concerned. The Supreme Court after considering the provisions of Section 28 has held that the suit contemplated by section 28 of the Bombay Rent Act is not only the suit between the landlord and the tenant in which that relationship is admitted, but also suits in which subsistence of the

relationship is disputed. The Supreme Court has held that for deciding the suit which was filed before the city civil court, the court will have to decide the question whether the Defendants were the tenants of the premises or not. According to the Supreme Court, the jurisdiction for deciding that question was exclusively with the jurisdiction of the Small Causes Court and therefore, the city civil court will not have the jurisdiction to entertain the suit and it is only the Small Causes Court which has the jurisdiction to try the suit in view of the provisions of Section 28 of the Bombay Rent Act. Observations found in paragraphs 7 & 8 of the judgment of the Supreme Court are relevant. They read as under:-

> 7. In a suit for recovery of rent where admittedly one party is the landlord and the other the tenant. S.28 of the Act explicitly confers on Courts specified therein jurisdiction to entertain and try the suit and expressly prohibits any other Court exercising jurisdiction with respect thereto. Similarly, in a suit relating to possession of premises where the relationship of landlord and tenant

admittedly subsists between the parties, jurisdiction to entertain and try such a suit is in the courts specified in S.28 and no other. all applications made under the Act are also to be entertained and disposed of by the courts specified in S.28 and no other. In all such suits or proceedings the Courts specified in S.28 also have the jurisdiction to decide all claims of questions arising out of the Act or any of its provisions. The words employed in S.28 make this quite clear. Do the provisions of S.28 cover a case where in a suit one party alleges that he is the landlord and denies that the other is his tenant or vice versa and the relief asked for in the suit is in the nature of a claim which arises out of the Act or any of its provisions? The answer must be in the affirmative on a reasonable interpretation of S.28. Suit No.483/4400 of the Court of Small Causes, Bombay was admittedly by a landlord. Eviction of the tenant and those to whom he had sublet the premises was sought on the ground that the latter were trespassers and the former was not entitled to remain in possession, that is to

say, that none of the defendants to that suit were protected from eviction by any of the provisions of the Act. The suit, in substance, was a denial of the right of the defendants as tenants. The claim of the defendants was that they were protected by the provisions of the Act. In such a suit the claim of the defendants was one which arose out of the Act or any of its provisions and only the Courts specified in S.28 and no other could deal with it and decide the issue.

8. The present suit filed in the City Civil Court raised in substance a claim to the effect that the plaintiffs were the tenants of the premises within the meaning of the Act. Such a claim was one which arose out of the Act or any of its provisions. The suit related to possession of the premises and the right of the landlord to evict any of the plaintiffs was denied on the ground that the first plaintiff was a tenant within the meaning of the Act and the premises had been lawfully sublet by him to the second and third plaintiffs. The City Civil Court was thus

called upon to decide whether the first plaintiff was a tenant of the premises within the meaning of the Act and whether he had lawfully sublet the same to the second and third plaintiffs. The City Civil Court, therefore, had to determine whether the plaintiffs had established their claim to be in possession of the premises in accordance with the provisions of the Act. As the tenancy of the first plaintiff had been terminated by the landlord, this plaintiff could resist eviction only if he established his right to continue in possession under the provisions of the Act. On the termination of the tenancy of the first Plaintiffs, outside the provisions of the Act, the subtenancy would come to an end and the landlord would be entitled to possession. This could be denied to him only if the second and third plaintiffs could establish that the premises had been lawfully sublet to them and under S.14 of the Act they must be deemed to be tenants of the premises. In other words, the City Civil Court could not decree the suit of the Plaintiffs unless their claim to remain in

possession was established under the Act or any of its provisions. Independent of the Act the plaint in this suit disclosed no cause of action. Section 28 obviously contemplates the filing of any suit relating to possession of any premises to which any of the provisions of Part II of the Act apply between a landlord and a tenant and it authorises the Court to deal with any claim or question arising out of the Act or any of its provisions in such a suit. The suit of the plaintiffs filed in the City Civil Court certainly is one relating to possession of premises to which the provisions of Part II of the Act apply and in that suit claims and questions arising out of the Act or any of its provisions had to be dealt with. It was, however, suggested that the suit in the City Civil Court was not one between a landlord and a tenant because the defendants of this suit did not admit that the plaintiffs were the tenants of the premises in question. Section 28 applies to a suit where admittedly the relationship of landlord and tenant within the meaning of the Act subsists between the parties. The plaint in the suit in the City

> Civil Court admits that the defendants were landlords of the premises at various stages and the plaintiffs were their tenants. the suit, therefore, was essentially a suit between a landlord and a tenant. The suit did not cease to be a suit between a landlord and a tenant merely because the defendants denied the claim of the plaintiffs. Whether the plaintiffs were the tenants would be a claim or question arising out of the Act or any of its provisions which had to be dealt with by the Court trying the suit. On a proper interpretation of the provisions of S.28 the suit contemplated in that section is not only a suit between a landlord and a tenant in which that relationship is admitted but also a suit in which it is claimed that that the relationship of a landlord and a tenant within the meaning of the Act subsists between the parties. The Courts which have jurisdiction to entertain and try such a suit are the Courts specified in S.28 and no other.

8. In view of the law laid down by the Supreme Court in the case of Babulal Bhuramal referred to above,

jurisdiction to try the question whether the document dated 1st April, 1992 creation of tenancy in favour of Harivadan was really acted upon or not would also be within the jurisdiction of the Small Causes Court. In my opinion, in the absence of any oral evidence being led, the learned arbitrator was obliged to go by the document on record. The admitted document on record was the agreement dated 1st April, 1992, which creates tenancy in favour of Harivadan. So far as document dated 7th April, 1999 is concerned the Respondents did not admit that document. According to Respondents Nos. 5 to 7 that was the fabricated document. Therefore, only document which was admitted between the parties was the document dated 1st April, 1992 whereby the Appellant created tenancy of the premises in favour of Harivadan. The Appellant chose not to lead any oral evidence, therefore, the arbitrator had to go by that document. The document established that tenancy of the premises was created in favour of Harivadan on 1st April, 1992. Handing over possession by Harivadan in January, 1999 was not at all proved. If one goes by the record, then, the arbitrator could not have made an award for Respondents Nos. 5 to 7 to hand over possession to the Appellant because admittedly the

document on record clearly established that tenancy of the premises was created by the Appellant in favour of Harivadan.

9. Taking overall view of the matter, therefore, in my opinion, the order made by the learned arbitrator calls for no interference at the hands of this court. The appeal, therefore, fails and is dismissed. The Appellant is directed to pay costs of the Respondents as incurred by the Respondents.

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